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ABSTRACT

Although the First Amendment guarantees the rights of freedom of speech and press, these rights are not absolute. With freedom comes the knowledge that irresponsible action can lead to the regulation of that freedom by others. The courts must balance conflicting rights in cases, such as press coverage of criminal trials, where irresponsible behavior by press, bench, and bar, has led to an imbalance between First and Sixth Amendment rights. Between 1951 and 1986 there have been a number of attempts to balance these rights, growing out of famous publicized court cases, such as that of Dr. Sam Sheppard. During this time the pendulum has swung from one extreme to the other, before finally settling close to the center. The parameters of the free press/fair trial debate have included the tolerance of sensationalistic reporting and the failure of judges to take simple precautions such as change of venue, continuance, sequestering of the jury, closing of criminal courtrooms, or even prior restraints against the press. Both the right to publish information about the criminal trial process and the right of the accused to receive a fair trial are equal and essential components in society. Safeguarding these rights is the responsibility of the press, bench, bar, and law enforcement officials and each must understand and respect the constitutional rights and responsibilities of the other for justice to be served. (Thirty-four notes are included.) (MS)

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# The Free Press/Fair Trial Debate: Balancing First and Sixth Amendment Rights 1951-1986

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Although the First Amendment guarantees the rights of freedom of speech and press, these rights are not absolute. With freedom comes the knowledge that irresponsible action can lead to the regulation of that freedom by others. As is often the case, the protection against outside regulation of freedoms lies in self retraint. When one right guaranteed by the Constitution comes in conflict with another, the courts must attempt to balance the two rights. Such is the case regarding press coverage of criminal trials. Irresponsible behavior by press, bench and bar, led to an imbalance between First and Sixth Amendment rights.

The Sixth Amendment to the Constitution guarantees those accused of criminal actions a right to a speedy and public trial by an impartial jury. These rights of a defendant often conflict with rights also guaranteed to the press under the First Amendment. Since a jury is selected after pretrial proceedings, media coverage of the arrest and pleadings of a criminal suspect may prejudice the opinion of prospective jurors. The media have always claimed a First Amendment right to cover trials, however historically, this coverage has sometimes compromised the conduct of trials. The courts reserve the right to preserve judicial discipline, while citizens and the press maintain a right to comment on and view the judicial process. When these rights collide, conflict and inequities result. Uncontrolled publicity about a criminal trial can result in an innocent person's conviction or a guilty person's acquittal. In either case, justice is not served. For the First and Sixth Amendments to function as intended, the press and the judiciary must respect one another's role in American society.

News coverage of crimes and criminal proceedings may create prejudice in prospective jurors and bias jurors who have already been selected. Reports of crimes, arrests and evidence that has been admitted at trial usually pose no problem. Two areas which pose the greatest problem are the publication of confessions and prior criminal records of defendants when neither are admissible as evidence.[1]

Criminal defendants are entitled to a "speedy and public trial by an impartial jury". Pretrial publicity is assumed to have an effect on the impartiality of that jury. Therefore, it would appear that every effort should be made to insulate prospective jurors from publicity which might influence their decision. Critics argue that our system assumes a truly impartial juror is one who is totally ignorant of the facts surrounding a case. An impartial juror has cynically been described as an uninformed moron who does not read the newspapers, watch television news or listen to the radio. Of course, this is not the case. Since the early days of our Republic it has been recognized that an impartial juror need not be completely unaware of the defendant or of the crime. In **United States v. Burr** (1807), Chief Justice John Marshall defined an impartial juror as one holding "light impressions which may be supposed to yield to testimony".[2] That is, one who is willing to listen to arguments and base any final decision on testimony.

The American Bar Association has suggested that the publication of the certain types of information may influence potential jurors and may make a fair trial impossible. The ABA recommends that the following material not be published: [3]

1. Opinions about an accused's character, guilt or innocence.

2. Admissions or confessions of guilt by the defendant.

3. References to the results of any examinations or tests,

such as lie detectors, or laboratory tests.

4. Statements about the credibility of witnesses or anticipated testimony.

5. Opinions concerning evidence or arguments in a case, and the liklihood that such evidence will be used at trial.

6. Prior charges and convictions, even though such information may be part of the public record.

These recommendations, although by no means universally adhered to, have resulted from a long struggle between the press and the judiciary. This struggle began in the early 19th Century and is by no means over. Now judges regularly attempt to control prejudicial pretrial publicity by granting a change of venue, a continuance, or sequestering the jury . A change of venue moves the location of the trial away from an area where prospective jurors are likely to hold preconceived opinions about the guilt or innocence of an accused person. A contiunuance postpones the starting date of a trial so that the strong emotions felt by a community, often accompanying the arrest of a suspect, have had time to subside. Sequestering the jury means limiting jurors contact with the outside world during a trial. This is done in hope that jurors will not be influenced by media reports of the proceedings, or by others desiring to affect the outcome of the trial. A judge may also limit the number of reporters allowed in the courtroom, or he may seal the past records of a defendant. In rare instances, he may actually close pretrial proceedings to reporters, however recent rulings have made this practice even less likely.

The media are somewhat more restrained in their coverage of crimes and trials than in the past and the relationship between the press and bar has steadily improved since the 1970's. This lessening of tensions follows a rocky tradition of crime reporting in America, culminating in the infamous murder trials of Leslie Irvin and Dr. Sam Sheppard. The fallout from these two cases set the stage for a difficult period in the history of the free press/fair trial debate.

The Tradition of Crime Reporting

The reporting of crime news in the United States has been a staple of journalism since the 1830's when Benjamin Day's New York Sun revolutionized the American newspaper by publishing for the masses instead of the elite. Crime news later contributed to the success of papers like Pultitzer's World and Hearst's Journal.

The growth of the tabloid press in the early part of this century led to a sensationalistic form of journalism in the 1920's often dubbed "Jazz Journalism".[4] Publications like the New York World, the Illustrated Daily News and Bernarr MacFadden's notorious Graphic, built readership on reports of crime, sex and gossip. Competition among the tabloids was fierce, and each attempted to out-sensationalize the other in order to boost circulation.

One of the more egregious examples of this sensationalism occurred during and after the 1927 trial of a corset salesman named Judd Gray and his sweetheart, Ruth Snyder. The two were on trial for the murder of Snyder's

husband. Not only was the trial covered in great detail, but the execution of Ruth Snyder in the electric chair at Sing Sing prison became one of the most outrageous examples of the bad taste exhibited by the tabloid press of that era. The Graphic teased its readers with the following:

> Don't fail to read tomorrow's Graphic. An installment that thrills and stuns! A story that fairly pierces the heart and reveals Ruth Snyder's last thoughts on earth; that pulses the blood as it discloses her final letters. Think of it! A woman's final thoughts just before she is clutched in the deadly snare that sears and burns and FRIES AND KILLS! Her very last words! Exclusively in tomorrow's Graphic.[5]

Not to be out done, the News sent photographer Tom Howard inside the execution chamber with a tiny camera strapped to his ankle where he photographed Snyder's execution. The gruesome picture made up page one of the January 14, 1928 Daily News, and was captioned "When Ruth Paid Her Debt to the State". The News sold 250,000 extra copies of that edition.[6]

The 1930's saw the demise of the tabloids, and a somewhat more responsible form of reporting emerged, but crime stories continued to be a staple of American journalism. Questionable behavior by journalists in search of a "scoop" still outraged press critics. The trial of Bruno Hauptmann in 1934 for the kidnapping and murder of aviator Charles Lindbergh's baby, drew more than 800 reporters, writing over a twenty-eight day period. Reporters were joined at the trial by show business personalities, politicians, and an estimated 20,000 members of the general public. The jury was photographed in the jury box, vendors sold souvenir "kidnap ladders" and regular reports about the guilt of Hauptmann appeared in newspapers across the country.

These excesses were not without consequence, however. Although Hauptmann was found guilty, the judge was critcized for permitting a "trial by newspaper"[7] Judges were were more careful to control the atmosphere of the trial and the conduct of reporters and others present in the courtroom. As a result of the conduct of the press during the Hauptmann trial, the American Bar Association adopted Canon 35 which prohibited the taking of pictures in the courtroom.

## The Road to the Supreme Court

After the Second World War a string of murders and other sensationalistic stories hit the news wires. The stage was set for another conflict between the press and the judiciary, centering on the public's right to be informed and a defendant's right to a fair trial by an impartial jury.

In 1951 the Supreme Court considered the first of several cases concerning jury prejudice fostered by the news media. It would be eight years, however, before the High Court would order a new trial solely on grounds that pretrial publicity made a fair trial impossible.

**Shepherd v. Florida**
**341 U.S. 50 (1951)**
**71 S.Ct. 549**

Four black men were accused of the rape of a white girl in Lake County Florida. Two were convicted and sentenced to death. During the trial,

community prejudice was pervasive. The defendants had been threatened with lynching, one of their parents homes had been burned and the National Guard had been called out to protect other blacks living in the community. Some blacks left the community after threats on their lives.

The newspapers had quoted the local sheriff as saying that the defendants had confessed, but no confession was offered at trial. The papers published several prejudicial articles during the investigation of the crime, including a cartoon picturing four electric chairs and headed "No Compromise-Supreme Penalty".[8] Although there had been motions for a change of venue, and continuance they had been denied.

A mistrial was declared, however, not on grounds of pretrial publicity, but on racial predjudice. Justice Jackson did note that if racical discrimination not been a factor, the defendants probably would not have received a fair trial anyway:

> ...[P]rejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, [Emphasis added] were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were pre-judged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which is generated.[9]

* * *

The following year the Supreme Court heard another case in which a confession was published and newspaper reports were somewhat sensationalist. This time the Court did not order a new trial. The Court did require Stroble to demonstrate that pretrial publicity hurt his case--a requirement that the Court would return to twenty-four years later in **Nebraska Press**.

**Stroble v. State of California**
**343 U.S. 181 (1952)**
**72 S.Ct. 599**

The defendant, Stroble, was charged with the first degree murder of a six year old girl. The Los Angeles newspapers published excerpts from an alleged confession. The district attorney had also offered his opinion of the defendant's guilt to the press. Newspaper articles referred to Stroble as a "werewolf", a "fiend" and a "sex mad killer". Stroble pleaded not guilty to the murder charge.

The trial itself was covered by the papers and no objection to press coverage was entered by Stroble, except for the newspapers' occasional reference to him as a "werewolf".[10]

Stoble was convicted by the trial court, and the Supreme Court affirmed the conviction. The Court rejected claims that he Stroble was deprived of a fair trial because of prejudical newspaper coverage. The Court noted:

> The matter of prejudicial newspaper accounts was first brought to the trial court's attention after petitioner's conviction, as one of the grounds in support of a motion for a new trial. At that time petitioner's present attorney urged that petitioner had been "deprived of the presumption of

innocence by premature release by the District Attorney's office of the details of the confession," and offered in support of that allegation certain Los Angeles newspapers published at the time of petitioner's arrest....

. . .[A]t no stage of the proceedings has petitioner offered so much as an affadavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this Court simply to read those stories and then to declare . . . that [two state courts] deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. [Emphasis added.]

* * *

The majority of the Court established that potentially prejudicial pretrial publicity, in and of itself, does not automatically result in an unfair trial. The Court ruled that in order for a mistrial to be declared, there must be a strong showing by the defendant that community prejudice affected the jury's verdict.

Justices Douglas and Frankfurter wrote dissents, however, which would later serve as foundations for a policy favoring a lesser showing by a defendant. Justice Frankfurter writes:

. . . I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of the 'traditional concept of the 'American way of the conduct of a trial.'" Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the orderly course of justice.

* * *

Essentially, Justice Frankfurter's position was that if the press cannot act responsibly voluntarily, it is up to the trial judge to insure that they do. This line of thinking would dominate rulings following the Court's **Sheppard** decision in 1966.

Between 1952 and 1961 the Supreme Court heard several cases in which defendants claimed to have been denied a fair trial as a result of pretrial publicity. None of the cases resulted in a strong call for a reversal based on the conduct of the media. In both **Marshall v. United States** (1959) and **Janko v. United States** (1961),the Supreme Court did call for new trials. But because the Supreme Court acted only in a supervisory capacity and did not attempt to determine whether the defendant had been denied "due process", these cases had little impact on the conduct of trials at the state and local level.[11]

Trial by Newspaper: "Mad Dog Irvin" and "Dr. Sam"

In 1961, the Supreme Court agreed to hear the case of Leslie Irvin, who had been convicted of murder. Irvin's would be the first state case in which a mistrial was declared by the Supreme Court solely on grounds of prejudicial

pretrial publicity.[12]

**Irvin v. Dowd**
**366 U.S. 717 (1961)**

On December 24, 1954, the news media in the Southwestern Indiana city of Evansville began reporting on what was to become one of the most highly publicized murder trials in Indiana. The Irvin trial focused attention on the way criminal trials were reported and conducted. Ultimately it changed the practices of both journalists and judges.

At issue was the way that the news media reported information about Irvin before his arrest and trial. This included the publication of his past criminal record and references to him as a "maniac killer" and a "Mad Dog". A second problem involved a state law which allowed a change of venue only one county away. Although Irvin's trial was moved from Vanderburgh to Gibson County, most potential jurists had been exposed to the same barrage of pretrial publicity since the predominate media were the same in both counties. The media and the court failed to safeguard Leslie Irvin's Sixth Amendment right to a fair trial.

The road to the Supreme Court began on Christmas Eve 1954, when the **Evansville Press** bannered **"Police All Out in Hunt for 'Mad Dog' Killer"**. Two very similar murders had occurred within a three week period. On December 2, Mary Holland, a 33 year old expectant mother and clerk at the Bellemeade Liquor Store, was forced to kneel over the commode and was shot in the head. On December 23, Whitney Wesley Kerr, an attendant at a Standard gas station was found shot in a similar manner. The cash registers at both businesses had been emptied, netting $318.11.

The news reports contributed to a growing siege mentality in the city. The papers warned that a "mad-dog killer" was on the prowl. They noted that off-duty policemen had given up their Christmas shopping to join the hunt for what was described as a "maniac killer". A $1000 reward was offered to the public for information leading to the arrest of the killer and one headline advised: "Your Tip May Help Police Trap Killer". Evansville's police chief described the slayings as "acts of cold blooded murder" and an "act of a homicidal maniac".[13]

No killer was found and it appeared that the Christmas-time murders did not signal a reign of terror after all. All was calm until the Spring of 1955. Then, within a week, four persons were killed in their homes within the Greater Evansville area. As in the December slayings, the motive seemed to be burglary, with money, jewelry and guns missing from each of the homes.

On March 21, 1955, Mrs. Wilhelmina Sailer was murdered in Posey County and on March 28 three members of the Duncan family were killed in Henderson County Kentucky. In both incidents the victims had been shot through the head, with their hands bound. The community was once again gripped by fear. Residents were afraid to walk alone at night and they kept their doors locked tightly during the day.[14]

Finally, on April 9, the **Evansville Press** reported that police had apprehended a suspect. The headline read **"Tight Secrecy Screens Quiz of 'Hottest' Murder Suspect, Evansville Ex-Convict."** The chief of detectives

issued a statement to the media in which he said that a suspect was being held for questioning. He added that the suspect had admitted some burglaries, but he refused to divulge the suspect's name. The detective expressed concern that to give any more information might "mess up the case".[15] The article continued by stating that the suspect had left his "trade mark" in the burglaries. The Henderson County Sheriff told reporters that the trade mark was the manner in which the suspect entered the houses of the victims. The article also states that a two-year old child was found near the body of her mother in the Duncan home. The Press ran a photo of the child and indicated that the toddler had picked the suspect out of a police lineup. The photo caption read: "Although the testimony of a two-year old couldn't be used in court, it may aid the police". The police would neither confirm nor deny the existence of the two-year-old witness.

Leslie Irvin's name was first associated with the killings on April 10, when the Press headline read "Junior Sheriffs Spotted Irvin's Black Sedan". The article continued:

> "It was the two young sheriff's patrol members who first got the license number of the car of Leslie Irvin, 30 year old parolee, whom police have been questioning since last Friday in connection with the slayings. . .

Although Irvin had not yet been formally charged with the slayings, the article pointed out that Irvin had "admitted more than two dozen burglaries in Vanderburgh, Posey, Warrick and Gibson counties." The article also noted that "Irvin's method of operation matches the way the Raymond Duncan home was broken into either the night before or the morning of the triple slayings".

A subheading in the April 10 article calls Irvin "Emotionally Unstable". An investigating officer is quoted as saying:

> "The suspect says he threw the gun away which he stole. . . . The method of operation of the subject has been the same in all cases of burglary and his car fits the description of the car that has been seen in the neighborhoods where the burglaries have been committed, some of the burglaries being in the murder area. . . it should be again pointed out that evidence which is being worked cannot be made public until such evidence has been completely worked."[16]

The next day readers were treated to a triple headline which read: "Murder Suspect Named By Police", "Leslie Irvin Taking Lie Detector Test", "Parole Violator Arrested Near Yankeetown; Car Matches One Seen at Duncan Home". Accompanying this headline was a full length, police lineup photograph of Irvin, showing the suspect with a police I.D. tag hanging from his waist.[17]

Statements of Irvin's prior criminal record appear throughout the article. Police are quoted as saying that "Irvin is a parolee sentenced for first-degree burglary from Indianapolis. He served approximately nine years before being paroled and has approximately nine years to serve on his parole."[18] The article also mentions that Irvin had agreed to submit to a lie detector test and that he admitted numerous burglaries and that the

prosecutor believed enough evidence was available to convict Irvin of First Degree Burglary.

On April 12, an article appeared which again reports Irvin as "emotionally unstable". More circumstantial evidence was reported in the article, noting that Irvin was absent from work on the days the killings took place.[19]

On Wednesday, April 13, the Press headline read: "Irvin Placed At Murder Scene: Reported Seeking To Make Deal." The subheading stated: "Car Seen Turning Into Duncan Lane" with a subsequent headline reading: "Henderson Sheriff Ready To Ask For Extradition; Local Police Deny Earlier Report of 'Confession'." Irvin still had not been charged with the murders, however there was little doubt in the minds of Evansville citizens that the killer had been caught.

Finally, on Thursday April 14, Leslie Irvin was officially charged with two counts of murder. He was held without bond. Although he had not yet been convicted, the Press was so convinced of his guilt that it ran a headline which boldly asked "What Made Leslie Irvin A Killer? Known as 'Likeable Fellow' With 'No Problems'." Once again a confession was published. The paper reported that Irvin had told Kentucky state police that he had killed three members of the Duncan family and left another for dead. A side bar to this article contained a clipping from the June 2, 1939 Press which was a news report headed: "Boy, 15, Admits Starting Fires at Bosse High". That "boy" was, of course, Leslie Irvin. The Press noted that this was his "first brush with the law".[20]

Subsequent news coverage of the trial preparations included references to Irvin's assistance in the recovery of a gun from a ditch by police, an admission that he "shot to death three members of the Goebel Duncan family" and the killing of Wilhelmena Sailer.[21]

The April 28 Press headline read: "2 Innocent Pleas Entered by Irvin". The story goes on to say:

> "The 31-year-old parolee, who led police to the murder weapons and told them how he killed six persons, will be examined by court appointed doctors to determine if he is mentally competent to stand trial."[22]

Irvin's trial began in November and was moved from Vanderburgh County, where he was charged, to adjoining Gibson County. His attorneys objected, stating that Irvin could not receive a fair trial so close to the counties of the crimes. Indiana law, however, permitted a change of venue to be merely one county away and the trial proceeded even though eight of the twelve jurors seated thought Irvin was gulity. Irvin was found guilty of murder and sentenced to death by electrocution by the Gibson County jury.

On January 19, 1956 he was to have returned to court to formally request a new trial, but instead he became the first prisoner to escape from the newly constructed Gibson County jail. In February he was found in San Francisco and brought back to Indiana.

Irvin's attorneys appealed his conviction on grounds that he had not received a fair trial by an impartial jury. Eventually the case was reviewed by the Supreme Court.

* * *

Mr. Justice Clark delivered the opinion of the Court:

. . . It is not required that jurors be totally ignorant of the facts and issues involved . . . To hold that the mere existence of any preconceived notions as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

. . . Here the build up of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing. For example, petitioner's first motion for a change of venue from Gibson County alleged that the trial of petitioner had become the cause celebre of this small community- so much so that curbstone opinions, not only as to the petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents.

. . . It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County. In fact, on the second day devoted to the selection of the jury, the newspapers reported that "strong feelings", often bitter and angry, rumbled to the surface," and that "the extent to which the multiple murders--three in one family--have aroused feelings throughout the area was emphasized Friday when 27 of the 35 pro-spective jurors questioned were excused for holding biased pretrial opinions. . . Spectator comments, as printed by the news-papers were " my mind is made up"; "I think he is guilty"; and "he should be hanged."

Finally, and with remarkable understatement, the headlines reported that "impartial jurors are hard to find". . . An examination of the 2,783-page voir dire record shows that 370 prospective jurors or almost 90% of those examined . . . entertained some opinion as to guilt- ranging in intensity from mere suspicion to absolute certainty.

. . . Here the "pattern of deep and bitter prejudice" shown to be present throughout the community, was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. . . Eight of the 12 thought petitioner was guilty. . . With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other
than one in which two-thirds of the members admit, before hearing testimony. to possessing a belief in his guilt. [Emphasis added.]

* * *

Leslie Irvin was eventually granted a new trial, in a less emotional atmosphere. He was found guilty of murder and sentenced to life on prison. He died of cancer in the Indiana State Penitentiary in 1983.

Six months before the first murders attributed to Irvin, a Cleveland Ohio osteopath became the chief suspect in the bludgeon slaying of his wife. The classic "trial by newspaper" case of Dr. Sam Sheppard would reach the Supreme Court five years after the Irvin decision and have even wider reaching effects.

**Sheppard v. Maxwell**
**384 U.S. 333 (1966)**

Dr. Sam Sheppard was convicted of second degree murder in the July 4, 1954 slaying of his pregnant wife, Marilyn. His conviction was upheld by the Ohio Supreme Court and the U.S. Supreme Court refused to hear his appeal. Sheppard served ten years of a life sentence in the Ohio State Penitentiary. Throughout this time Sheppard maintained that he was innocent, and ultimately his attorneys were able to bring a habeous corpus proceeding to a federal court. The proceeding argued that Sheppard had been denied a fair trial because of the conduct of the press before and during the trial. The federal district court agreed, calling Sheppard's first trial a "mockery of justice".[23]

The appellate court disagreed and ordered Sheppard to continue serving his sentence, however Sheppard once again appealed to the Supreme Court. Sheppard's attorneys argued that the conduct of the press denied Sheppard his constitutional right to be tried by a fair and impartial jury. The Supreme Court agreed to hear this most bizarre case. This time, Sheppard was defended by F.Lee Bailey.

Mr. Justice CLARK delivered the Opinion of the Court:

* * * On the day of the tragedy, July 4, 1954, Sheppard pieced together for several local officials the following story: He and his wife had entertained neighborhood friends, the Ahrens, on the previous evening at their home. After dinner they watched television in the living room. Sheppard became drowsy and dozed off to sleep on a couch. Later, Marilyn partially awoke him saying that she was going to bed. The next thing he remembered was hearing his wife cry out in the early morning hours. He

hurried upstairs and in the dim light from the hall saw a "form" standing next to his wife's bed. As he struggled with the "form" he was struck on the back of the neck and rendered unconscious. On regaining his senses he found himself on the floor next to his wife's bed. He raised up, looked at her, took her pulse and "felt that she was gone." He then went to his son's room and found him unmolested. Hearing a noise he hurried downstairs. He saw a "form" running out the door and pursued it to the lake shore. He grappled with it on the beach and again lost consciousness. Upon his recovery he was laying face down with the lower portion of his body in the water. He returned to his home, checked the pulse on his wife's neck, and "determined or thought that she was gone." He then went downstairs and called a neighbor Mayor Houk of Bay Village. The Mayor and his wife came over at once, found Sheppard slumped in an easy chair downstairs and asked, "What happened?" Sheppard replied: "I don't know but somebody ought to try to do something for Marilyn". Mrs. Houk immediately went up to the bedroom. * * * After Mrs. Houk discovered the body, the Mayor called local police, Dr. Richard Sheppard, petitioner's brother, and Ahrens. The local police were the first to arrive. * * * Richard Sheppard then arrived, determined that Marilyn was dead, examined his brother's injuries, and removed him to the nearby clinic operated by the Sheppard family. * * * The Sheppard home and premises were taken into "protective custody" and remained so until after the trial.

From the outset officials focused suspicion on Sheppard. * * * Dr. Gerber, the Coroner, is reported--and it is undenied--to have told his men, "Well, it is evident the doctor did this, so let's go get the confession out of him." * * * The newspapers played up Sheppard's refusal to take a lie detector test and the "protective ring" thrown up by his family. * * * More stories appeared when Sheppard would not allow authorities to inject him with "truth serum."

On the 20th, the "editorial artillery" opened fire with a front page charge that somebody is "getting away with murder." * * * The following day * * * another page-one editorial was headed: "Why No Inquest? Do It Now, Dr. Gerber." The Coroner called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium. * * * In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and at the witness stand. * * * Sheppard was brought into the room by police who searched him in view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate. When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes. At the end of the hearing the Coroner announced that he "could" order Sheppard held for the grand jury, but did not do so.

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies

in his statements to authorities. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence.

* * * On July 28, an editorial entitled "Why Don't Police Quiz Top Suspect" demanded that Sheppard be taken to police headquarters. It described him in the following language:

> "Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases * * * ."

A front-page editorial on July 30 asked: "Why Isn't Sam Sheppard In Jail?" It was later titled "Quit Stalling--Bring Him In." * * *

That night at 10 o'clock Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival.

* * * The publicity then grew in intensity until his indictment [by a grand jury] on August 17. * * * Headlines announced, inter alia, that: "Doctor Evidence is Ready for Jury," "Corrigan Tactics Stall Quizzing," "Sheppard 'Gay Set' Is Revealed by Houk," "Blood Is Found, Police Claim," "Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him." * * *

With this background the case came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for municipal judge and the presiding judge, Judge Blythin, was a candidate to succeed himself. Twenty-five days before the case was set, a list of 75 veniremen were called as prospective jurors. This list, including the addresses of each venireman, was published in all three Cleveland newspapers. * * * [A]nonynous letters and telephone calls * * * regarding the impending prosecution were received by all of the prospective jurors.

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside the bar, in back of the single counsel table. * * * Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. * * * The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. * * * Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial. * * * Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room * * * .

* * * In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury.

* * * The jurors themselves were constantly exposed to the news media. Every juror, except one, testified at voir dire to reading about the case in the Cleveland papers or to having heard broadcasts about it. * * * During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. * * * The day before the verdict was rendered--while the jurors were at lunch and sequestered by two bailiffs-- the jury was separated into two groups to pose for photographs which appeared in the newspapers.

We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes: * * *

On the second day of voir dire examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing road-blocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Sheppard's counsel objected to this broadcast and requested a continuance [emphasis added], but the judge denied the motion. When counsel asked the court to give some protection from such events the judge replied that "WHK doesn't have much coverage * * * ".

On November 24, a story appeared under an eight-column headline: "Sam Called A 'Jekyll-Hyde' by Marilyn, Cousin To Testify." * * * No such testimony was ever produced at the trial. * * * Defense counsel made motions for change of venue continuance and mistrial [Emphasis added], but they were denied.

* * * When the trial was in its seventh week, Walter Winchell broadcast over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: "Would that have any effect on your judgement?" Both replied "No." This was accepted by the judge as sufficient; he merely asked the jury to "pay no attention whatever to that type of scavenging * * *."

* * * After the case was submitted to the jury, it was sequestered [Emphasis added] for its deliberations, which took five days and four nights. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered in the hotel. * * * The calls were placed by the jurors themselves; no record was kept of the jurors who made calls, the telephone numbers or the parties called. The bailiffs sat in the room where they could hear only the jurors' end of the conversation. The court had not instructed the bailiffs to prevent such calls. * * * [D]efense counsel urged that this ground alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.

The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials." In Re Oliver, 333 U.S. 257,268 (1947) A responsible press has always been regarded as the handmaiden of effective judicial

administration, especially in the criminal field. * * * The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. * * * But the Court has also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."Bridges v. State of California, 314 U.S. at 271 (1941). * * * " [O]ur system of law has always endeavored to prevent even the probability of unfairness."[24]

* * * Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered. [Emphasis added] * * * [J]urors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside the courtroom, without adequate directions not to read or listen to anything concerning the case. * * * Moreover the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers [Emphasis added].

* * * [W]e believe that arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled."

* * * The carnival atmosphere at trial could easily have been avoided since the courthouse premisies are subject to the control of the court.

* * *

Sam Sheppard was released from prison and was tried a second time for the murder of Marilyn in 1966. This time he was acquitted--a murder weapon had never been found and the case was difficult to prosecute twelve years after the fact. The ten years in the Ohio State Penitentiary had taken their toll on Sheppard. He found it difficult to readjust to society. He had married a German immigrant with whom he had corresponded while in prison. When he tried to resume his medical practice, several malpractice suits ended his career. His second marriage ended in divorce, with accusations by his German wife that he had threatened her with physical harm. With no hope of resuming his medical practice, and surrounded by the notoriety of his past, fittingly Sheppard became a professional wrestler. Billed as "Dr. Sam", he married the 19 year-old daughter of his promoter and adopted the lifestyle of a biker. He died of liver disease in 1970.

<u>The Impact of Sheppard</u>

Justice Clark faulted Judge Blythin for failure to control the conduct of reporters and photographers in the courtroom. Early in the trial, Judge Blythin stated that neither he, nor anyone else could "restrict prejudicial news accounts". Clark disagreed and made several suggestions for curbing the excessive behavior of the news media. These suggestions included (1) limiting the number of reporters in the courtroom; (2) insulating the witnesses from the press; (3) controlling the release of leads and gossip to the press by police, witnesses and counsel for both sides and (4) proscribing extrajudicial statements by anyone involved in the trial. Clark also suggested that judges should consider continuance, change of venue and sequestering of the jury as means of safeguarding the trial process from outside influence.

Justice Clark did not blame the press for Sheppard's lack of a fair trial, but Judge Blythin for not insuring that a fair trial was obtained. Clark did not suggest that courtrooms be closed to the press, in fact he notes that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." However, as we shall see, the fallout from **Sheppard** included the issuance of prior restraints against the media to the closing of the courtroom as a means of preserving "judicial serenity". No judge wanted to risk becoming the next "Judge Blythin", and the backlash against media coverage of trials was swift in coming.

As a result of **Sheppard**, judges now looked for effective ways to control publicity about trials and the conduct of reporters in the courtroom. The suggestions made by Justice Clark in **Sheppard** and recommendations made by the Warren Commission investigating the assasination of President Kennedy, prompted the American Bar Association to adopt the **"Reardon Report"** in 1968. The report resulted from a study by the ABA Advisory Commitee on Fair Trial, headed by Massachusetts Supreme Court Justice, Paul Reardon. Essentially, the report attempted to define acceptable conduct by bench, bar and press which would insure that a defendant received a fair trial. It incorporated Justice Clark's **Sheppard** suggestions with others promulgated by the Advisory Committee. Although not legally binding, enforcement of these recommendations was to be as a standing order against members of the bar under the code of professional responsibility. Law enforcement agencies would regulate the conduct of their personnel and court personnel were to be controlled by rules of the court.

The most controversial aspect involved the means of controlling the news media and other "outside" agencies. The report recommended that judges use their somewhat questionable power to cite for contempt, for actions committed outside of the courtroom. This meant that members of the press could be cited for printing stories designed to influence the outcome of a trial. A press threatened by the use of this power would be less likely to print stories which might be construed as containing prejudical material, thus creating a chilling effect on First Amendment rights. Additionally, the report recommended closing pretrial hearings to the press and public if the judge deemed that a fair trial was in jeopardy. The pendulum had begun to swing in a direction favoring Sixth Amendment over First Amendment rights.

Examples of information not to be published about a defendant included (1) prior criminal records, (2) character references, (3) confessions, (4) test results and (5) out of court speculation on guilt or innocence or the merits of evidence. Obviously, all of these prohibitions were violated in **Irvin** and **Sheppard**.

The Reardon Report allowed publication of (1) facts and circumstances of an arrest, (2) identity of the person arrested, (3) name of the arresting officer or agency, (4) descriptions of physical evidence in-hand, and (5) the next step in the judicial process.

Needless to say the Reardon Report was not well received by the press. It was also criticized by certain elements of the bench and bar. The out-of-court contempt power was never used, however in the years following **Sheppard**, prior restraints or gag orders became a relatively common practice. Gag orders are restrictive orders against the media designed to limit the impact of publication on the trial process. In other words, the court prohibits the news media from publishing certain information about a trial. If a news medium violates the order, they are held in contempt of court.

The Reardon Report did foster dialogue between the press and bar. In the interest of harmony, lawyers, judges and journalists in many states began formulating voluntary guidelines designed to alleviate the conflict between free press and fair trial. These guidelines were fashioned after the Reardon Report and suggestions found in the **Katzenbach Rules**. The Katzenbach Rules were a set of guidelines formulated by U.S. Attorney General Nicholas Katzenbach in 1965, designed to govern the release of potentially prejudicial information by federal law enforcement officials. Although less controversial than the Reardon Report, they prohibited Justice Department officials from voluntarily releasing information about a defendant's guilt or innocence, past criminal record, confessions or alibis and the results of polygraph, ballistic or other laboratory tests.[25]

For a period, the voluntary guidelines seemed to be alleviating much of the tension between press and bar. In 1971, however tensions resumed, with a vengence.

**United States v. Dickinson**
**465 F.2d 496 (5th Cir. 1972)**

This case is set against the backdrop of racial unrest in the South during the early 1970's. A young VISTA worker [26] was charged with conspiracy to murder the mayor of Baton Rouge Louisiana. A preliminary hearing was set in U.S. District Court to determine whether the state had a legitimate case, or whether its action was based on racial prejudice.

Judge E. Gordon West, who would conduct the hearing, knew that the prosecution would offer evidence against the civil rights worker which, although damaging, may not be admissible in court. Although the hearing was to be public, Judge West ordered reporters not to publish any of the testimony heard during the preliminary hearing. Two reporters, Larry Dickinson of the **Baton Rouge State Times** and Gibbs Adams of the **Baton Rouge Morning Advocate**, felt that the order was in violation of the First Amendment and chose to write stories which included testimony offered at the hearing. When the stories were published, Judge West found the two reporters in contempt and fined each $300. They appealed the decision.

Appellate judge, John R. Brown noted that while Judge West's gag order violated the First Amendment, the reporters were not free to simply ignore the order. Chief Judge Brown writes:

> The conclusion that the District Court's order was constitutionally invalid does not necessarily end the matter of the validity of the contempt convictions. There remains the very formidable question of whether a person may with impunity knowingly violate an order which turns out to be invalid. We hold that in the circumstances of this case he may not.
>
> We begin with the well-established principle in proceedings for criminal contempt that an injunction duly issuing out of a court having subject matter and personal jurisdiction must be obeyed [Emphasis supplied], irrespective of the validity of the order. Invalidity is no defense to criminal contempt. * * * Court orders have to be obeyed until they are reversed or set aside in an orderly fashion [Emphasis added].[27]

* * * Where the thing enjoined is publication and the communication is "news", this condition presents some thorny problems. Timeliness of publication is the hallmark of "news" and the difference between "news" and "history" is merely a matter of hours. Thus, where the publishing of news is sought to be restrained, the incontestable inviolability of the order may depend on the immediate accessibility of orderly review. * * * But newsmen are citizens too. They too may sometimes have to wait. They are not yet wrapped in immunity or given the absolute right to decide with impunity whether a judge's order is to be obeyed * * * .

Under the circumstances, reporters took a chance. As civil diobedients have done before they ran a risk * * *. Having disobeyed the Court's decree, they must, as civil disobeyers, suffer the consequences for having rebelled at what they deem injustice, but in a manner not authorized by law.

* * *

The case was returned to the district court, where Dickinson and Adams were once again convicted and fined $300. The U.S. Supreme Court refused to review the case in 1973.[28]

Dickinson gave rise to an increasing number of prior restraints against the press. Until 1976, judges wishing to control media publicity about a trial often considered some form of restrictive order to be a regular part of the arsenal for maintaining courtroom "sanctity".

Four years after **Dickinson**, the issue of the constitutionality of whether a trial court could issue a gag order against the press to insure a fair trial came to the Supreme Court. In **Nebraska Press Assn. v. Stuart**(1976), the High Court oppossed the use of prior restraints against the media.

**Nebraska Press Assn. v. Stuart**
**427 U.S. 539 (1976)**

On the night of October 18, 1975 Erwin Charles Simiants killed six members of the James Kellie family in Sutherland Nebraska. Simiants then confessed the killings to his family. His father told him to turn himself in to police. Instead, Simiants stopped by a local bar and had a drink before hiding out in some high weeds behind his victims' house. Sutherland is a town of 840 located in Lincoln County, which has 36000 residents. The largest city is North Platte, with a population of 24,000. Needless to say, the news of the crime spread quickly that night. Before long reporters and cameramen were pouring into tiny Sutherland from as far away as Denver. At 8:00 the next morning, Simiants walked into the home of his uncle, where he was immediately arrested by state police and the local sheriff.

By 9:00 Simiants had been booked and confessed to police. Although that confession had not been witnessed by the media, the chief prosecutor was quoted by the Associated Press as saying "Simiants apparently walked into his father's home after the shooting and told his father he was responsible for the deaths".[29]

News coverage of the crime was pervasive. A report on NBC's Today program noted that "Simiants reportedly confessed to his father and fled".[30] Additionally, the North Platte Telegraph included a report that quoted Simiant's father as saying "My son killed five or six people here."[31]

Because of the wide news coverage, both the county attorney and the defense counsel asked the county court to close the preliminary hearing to the public and issue a restrictive order against further news coverage, so that an impartial jury could be selected. County Judge Ronald Ruff refused to close the hearing, but ordered the news media not to report on any testimony or evidence taken at the hearing.

The news media, represented by the Nebraska Press Association, appealed the order to the U.S. District Court in Lincoln. After all, argued the Press Association, the state of Nebraska had already drawn up a set of press-bar guidelines, patterned after the Sheppard decision, designed to deal with just this sort of matter. The gag order would have to stand, however, until overturned by a higher court.

Judge Hugh Stuart heard the Press Association's appeal and modified the order. Acknowledging the Nebraska Press-Bar Voluntary Guidelines, Judge Stuart made the guidelines manadatory in this case. Stuart noted that the nature of the crimes, pretrial publicity could present a "clear and present danger" to Simiant's right to a fair trial. [32] Judge Stuart's order would only apply until a jury was selected and prohibited the reporting of (1) the existence or contents of a confession, (2) statements made by Simiants to other persons, (3) the contents of a note written by Simiants on the night of the crime, (4) the results of medical testimony taken at the preliminary hearing and (5) the identity of victims who had been sexually assaulted during the crime.[33] Stuart then ordered the media not to report that they were operating under a gag order. In essence, Judge Stuart had issued a "gag on a gag". Any news medium reporting on the five issues listed above, or informing the public that they were under a restraining order would be cited for contempt of court.

Again, appeals were filed and after much legal manuevering the U.S. Supreme Court agreed to hear the Nebraska Press case. In the meantime, the Simiants case continued. [34] Before the Supreme Court decided on the constitutionality of the "gag on a gag", Simiants trial was over.[35]

Chief Justice Burger delivered the opinion of the Court:

> * * * Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only a "clear and present danger that pretrial publicity could impinge on a fair trial." His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.
>
> We find little in the record that goes to another aspect of our task, determining whether measures short of an order restraining all publication would have insured the defendant a fair trial. Although the entry of the order might be read as a judicial determination that

other measures would not suffice, the trial court made no express findings to that effect * * * .

* * * There is no finding that alternative measures would not have protected Simiants' rights * * * .

* * * [W]e note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it. * * *

* * * Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication of information gained from other sources we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met * * * .

* * *

In **Nebraska Press** the Supreme Court said that three elements must be met before a judge can issue a valid restraining order against the press in order to insure a fair trial. First, there must be a liklihood of widespread prejudicial publicity. Second, all other methods of controlling such publicity must have been exhausted. This includes rigorous voir dire, change of venue and continuance. Finally, there must be a showing that a restraining order will control prejudicial publicity. All three of these guidelines must be met for a restraining order to be constitutional. Obviously, meeting these criteria is difficult; hence the "heavy presumption against prior restraint" by the Supreme Court.[36]

One year later, the Supreme Court once again struck down prior restraints against the media. In **Oklahoma Publishing v. District Court** (1977) the Court noted that although the press could be barred from attending juvenile proceedings, if the press was allowed to attend they could not be prohibited from publishing information obtained at such proceedings.[37]

In the years following **Nebraska Press** and **Oklahoma Publishing**, the number of restraining orders against the press declined, however some judges still felt compelled to issue prior restraints. In 1983 a federal district court judge issued a restraining order against CBS. The order forbade the broadcast of videotapes of former automobile manufacturer John DeLorean's converations with federal undercover narcotics agents during his investigation for alleged cocaine dealing. The judge said that broadcast of

the tapes would prejudice potential jurors. CBS appealed the order, and won the right to broadcast the videotapes. In a decision based on **Nebraska Press**, the U.S. Court of Appeals said that the district court had not exhausted all other alternatives available for protecting DeLorean's right to a fair trial.[38]

### Closing The Courtroom

While **Nebraska Press** addressed the issue of prior restraint, the closing of pretrial hearings to the press and public continued to be a major issue into the 1980's. Because of the unliklihood that a prior restraint order would be upheld after **Nebraska Press**, some courts sought to control potentially prejudicial news coverage by limiting access to the courtroom. The Supreme Court first gave apparent support to the concept that there is no First Amendment right on the part of the press to attend pre-trial proceedings in **Gannett v. DePasquale** (1979). In a 5-4 decision, the Court upheld a New York judge's order excluding a Gannett newspaper reporter from a pretrial hearing in a second degree murder case. [39] Writing for the majority, Justice Potter Stewart's opinion was unclear as to whether reporters had no constitutional right to attend pretrial hearings or trials themselves. Not only did the confusion created by **Gannett** lead to an outcry by the press, but to a number of courtroom closings. Between July and September of 1979, some more than 50 courtrooms were closed for some or all portions of pretrial or trial proceedings.[40]

The **Gannett** decision was weakened only a year later in **Richmond Newspapers v. Virginia** (1980), when the Court ruled that trials were presumptively open to the public. Chief Justice Burger used language in writing the majority opinion in **Richmond Newspapers** to emphasize that **Gannett** dealt with pretrial hearings and that in **Richmond Newspapers** the issue was trial proceedings.

**Richmond Newspapers v. Virginia**
**488 U.S. 555 (1980)**

The defendant in this case was about to be tried for a fourth time for the murder of a hotel manager. The first trial had been reversed on appeal, and the two subsequent trials had ended in mistrials. Because of the great deal of publicity surrounding the case and the unusual circumstance of two mistrials, defense counsel moved that the trial be closed to the public. The prosecution did not object. The judge granted the motion. Two newspaper reporters did object and they filed a motion to vacate the closure order. The motion was denied, the press appealed and the case eventually found its way to the Supreme Court. The Court used this case to clarify language in **Gannett** and to establish that there is a First Amendment right to attend trials and that there is no right to a private trial. The pendulum had begun to swing back toward the center.

Chief Justice Burger delivered the Opinion of the Court:

" * * * In **Gannett Co. v. DePasquale** * * * the Court was not required to decide whether a right of access to trials, as disinguished from pretrial motions was guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the

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public nor the press an enforceable right of access to a pretrial suppression hearing. One concurring opinion specifically emphasized that "a hearing on a motion before trial to supress evidence is not a trial . . ." * * * Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials * * * [Emphasis supplied][41]

* * * We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." **Branzburg, supra** at 681

* * * [A]lthough the Sixth Amendment guarantees the accused a right to a public trial, it does not give a right to a private trial. * * * Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public * * *

The Court emphasized that this right of access applies only to criminal trials. It did not apply the right to civil proceedings.

* * *

Two years later the Supreme Court reaffirmed the **Richmond Newspapers** holding in **Globe Newspapers v. Superior Court** (1982). At issue was a Massachusetts statute that required closure of all trials dealing with certain sex crimes. The defendant was on trial for forcible rape against two juveniles. When the judge closed the trial, reporters from the **Boston Globe** appealed the order. Eventually, the Supreme Court found Massachusetts' manadatory closure statute violated the First Amemdment right of access to criminal trials recognized in **Richmond Newspapers.** [42]

By the mid 1980's, the Supreme Court had further rejected the Reardon Report's suggestion that a trial might be closed on a motion from the defendant if there is reason to believe a fair trial may be in jeopardy. In two cases involving the **Press-Enterprise** Co., the Supreme Court dealt serious blows to this concept and returned to a more balanced position regarding First and Sixth Amendment rights. Although the names of these two cases are similar, they are otherwise unrelated.[43]

In **Press Enterprise I** (1984), the Supreme Court extends the **Richmond Newspapers** doctrine by ruling that jury selection, like trials, should be conducted in public. Chief Justice Burger also provides an interesting history of the jury selection process and it's role in the guarantee of a fair trial.

**Press-Enterprise v. Riverside County Superior Court**
**No. 82-556 (1984) 10 Med.L.Rptr. 1161**
**(Press-Enterprise I)**

Chief Justice Burger delivered the opinion of the Court:

* * * Albert Greenwood Brown, Jr. was tried and convicted of the rape and murder of a teenage girl, and sentenced to death in California Superior Court. Before the voir dire examination of

prospective jurors began, petitioner, Press-Enterprise Co., moved that voir dire be open to the public and to the press. Petitioners contend that the public had an absolute right to attend the trial, and asserted that the trial commenced with the voir dire proceedings. The State opposed petitioner's motion, arguing that if the press were present juror responses would lack the condor necessary to assure a fair trial.

The trial judge agreed and permitted petitioner to attend only the "general voir dire." He stated that counsel would conduct the "individual voir dire with regard to death qualifications and any other special areas that counsel may feel some problem with * * *." The voir dire consumed six weeks and all but approximately three days was closed to the public. [Emphasis supplied]

After the jury was empaneled, petitioner moved the trial court to release a complete transcript of the voir dire proceedings. * * * The court denied petitioner's motion * * * .

After Brown had been convicted and sentenced to death, petitioner again applied for release of the transcript. In denying this application, the judge stated:

> "The jurors were questioned in private relating to past experiences, and while most of the information is dull and boring, some of the jurors had special experiences in sensitive areas that do not appear to be appropriate for public discussion."

Petitioner then sought in the California Court of Appeal a writ of mandate to compel the Superior Court to release the transcript and vacate the order closing the voir dire proceedeings. The petition was denied. The California Supreme Court denied petitioner's request for a hearing. We granted certiorari. * * *. We reverse.

* * * The roots of open trials reach back to the days before the Norman Conquest when cases in England were brought before "moots," a town meetings kind of body such as the local court of the hundred or the county court.[44] Attendance was virtually compulsory on the part of freemen of the community * * * in rendering a judgement. The public aspect thus was "almost a necessary incident of jury trials since the presence of a jury . . . already insured the presence of a large part of the public."[45]

As the jury system evolved in the years after the Norman Conquest, and the jury came to be but a small segment representing the community, the obligation of all freemen to attend criminal trials was relaxed; however, the public character of the proceedings, including jury selection remained unchanged. * * *

The presumptive openness of the jury selection process in England, not surprisingly, carried over into proceedings in Colonial America. * * * Public jury selection thus was the common practice in America when the Constitution was adopted.

* * * No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness.

The open trial thus plays as important a role in the administration of justice today as it did for the centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed * * *.

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Richmond Newspapers, supra, at 572. Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweights the value of openness. * * *

The judge at this trial closed an incedible six weeks of voir dire without considering alternatives to closure. Late the court declined to release a transcript of the voir dire even while stating that "most of the information" in the transcript was "dull and boring". * * * Those parts of the transcript reasonablly entitled to privacy could have been sealed without such a sweeping order; a trial judge should explain why the material is entitled to privacy.

* * *

In Press Enterprise II (1986) by a 7-2 margin, the Court said that defendants wishing to close a preliminary hearing must demonstrate that an open courtroom would have a "substantial probability" of endangering their rights to a fair trial. This case all but overules the validity of Gannett and continues movement towards opening the entire judicial process begun in Nebraska Press and developed in Richmond Newspapers, Globe Newspapers, and Press-Enterprise I.

Press-Enterprise Co. v. Riverside County Superior Court
S.Ct. 13 Med.L.Rptr. 1002 (1986).
(Press-Enterprise II)

Chief Justice Burger delivered the Opinion of the Court:

On December 23, 1981, the State of California filed a complaint * * * charging Robert Diaz with 12 counts of murder and seeking the death penalty. The complaint alleged that Diaz, a nurse, murdered 12 patients by administering massive doses of the heart drug, lidocaine. The preliminary hearing commenced on July 6, 1982. Diaz moved to exclude the public from the proceedings * * *.[4] The Magistrate granted the motion, finding that closure was necessary because the case had attracted national publicity and "only one side may get reported in the media."

The preliminary hearing continued for 41 days. Most of the testimony and the evidence presented by the State was medical and scientific; the remainder consisted of testimony by personnel who worked with Diaz on the shifts when the 12 patients died. Diaz did not introduce any evidence, but his counsel subjected most of the witnesses to vigorous cross-examination. Diaz was held to answer on all charges. At the conclusion of the hearing, Press-Enterprise Company asked that the transcript of the proceedings be released. The Magistrate refused and sealed the record.

On January 21, 1983, the State moved in Superior Court to have the transcripts of the hearing released to the public; petitioner later joined in support of the motion. Diaz opposed the motion, contending the release of the transcripts would result in prejudicial pretrial publicity. The Superior Court found that * * * there was * * * "a reasonable liklihood that the release of all or any part of the transcript might prejudice defendant's right to a fair and impartial trial." [Cited from California's statute.]

Petitioner then filed a peremptory writ of mandate with the Court of Appeal. That court originally denied the writ but, after being so ordered by the California Supreme Court, set the matter for a hearing. Meanwhile, Diaz waived his right to a jury trial and the Superior Court released the transcript. After holding that the controversy was not moot, the Court of Appeal denied the writ of mandate.

The California Supreme Court thereafter denied petitioner's peremptory writ of mandate * * * .

* * * We granted certiorari. * * * We reverse.

* * * In Press-Enterprise I, we summarized the holdings of prior cases, noting that openness in criminal trials, including the selection of jurors "enhances both the fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." 464 U.S. at 501

* * * The considerations that led the Court to apply the First Amendment right of access to criminal trials in Richmond Newspapers and Globe and the selection of jurors in Press-Enterprise I lead us to conclude that the right of access applies to preliminary hearings as conducted in California.

* * *

Once again the Court did not rule out closing some pretrial hearings, but the standards are clearly defined. In Press-Enterprise II the Court reiterated criteria established in Press-Enterprise I and Richmond Newspapers: (1) that there must be a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure will prevent, and (2) that reasonable alternatives to closure cannot adequately protect the defendant's trial rights.[47]

These rulings do not affect the secrecy of grand jury deliberations. The Court acknowledged that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."[48]

Summary and Conclusions

Between 1951 and 1986 there have been a number of attempts by the Supreme Court to balance First and Sixth Amendement rights. During this time the pendulum has swung from one extreme to the other, before finally settling close to the center. The parameters of the free press/fair trial debate have included the tolerance of sensationalistic reporting and the failure of judges to take the simple precautions like change of venue,

continuance and sequestering of the jury, and the closing of criminal courtrooms and prior restraints against the press. Now there appears to be a presumption of "openness" regarding the criminal trial process.

This period has been a very volatile time. It must be remembered that the Framers of the Constitution did not assign one right more importance than the other. Both the right to publish information about the criminal trial process and the right of the accused to receive a fair trial are equal and essential components in our society. From time to time there will inevitably be diagreement over interpretation and application of these rights. Recent case law has, however, provided a framework responsive to the problems inherent in the free press/fair trial issue. Safeguarding these rights is the responsibility of all parties involved. This includes members of the press, bench and bar, as well as law enforcement officials. Each must understand and respect the constitutional rights and responsibilities of the other for justice to be served.

## NOTES

[1] Dale Spencer et.al Free Press & Fair Trial, (Washington D.C.: American Society of Newspaper Editors/American Newspaper Publishers Association Foundation, 1982) p. 17
[2] United States v. Burr 24 Fed. Cas. 49 No. 14692g (1807)
[3] Fair Trial/Free Press Voluntary Agreements, published by ABA's Legal Advisory Committee on Fair Trial and Free Press (Chicago, 1974), pp.7-8
[4] See Simon Michael Bessie, Jazz Journalism (New York: E.P. Dutton & Co.: 1938. Reissued by Russell & Russell Publishing, 1969).
[5] Helen M. Hughes, News and the Human Interest Story (Chicago: University of Chicago Press, 1940), p.235.
[6] Edwin Emery, The Press and America 2nd Ed., (Englewood Cliffs N.J.: Prentice-Hall, 1962) pp. 629-30.
[7] Ibid. p. 633. Also see Gillmor & Barron, Mass Communication Law p.491.
[8] 341 U.S. at 53
[9] Ibid. at 51
[10] 72 S.Ct. at 605
[11] See Levition v. United States 343 U.S. 946 (1952); U.S. ex rel Darcy v. Hardy 351 U.S. 454 (1956); Marshall v. United States 360 U.S. 310 (1959); Janko v. United States 366 U.S. 716 (1961).
[12] Marshall v. United States, 360 U.S. 310 (1959) was the first conviction in a federal court reversed solely on grounds of pretrial publicity.
[13] The Evansville Press, December 24, 1954
[14] Interview with Seymour Brodsky, News Director WEHT-TV 1955. Interview conducted August 18, 1987.
[15] The Evansville Press April 9, 1955
[16] The Evansville Press, April 10, 1955, p. 1.
[17] The Evansville Press, April 11, 1955, p. 1.
[18] Ibid.
[19] The Evansville Press, April 12 1955, p. 1.
[20] The Evansville Press, April 14, 1955, p. 1.
[21] The Evansville Press, April 22, 1955, p. 1.
[22] The Evansville Press, April 28, 1955, p. 1.
[23] Sheppard v. Maxwell, 231 F.Supp.37 (S.D. Ohio, 1964).
[24] Citing In re Murchison 349 U.S. 133, 136 (1955)
[25] See Statement of Policy Concerning the Release of Information by Personnel of the Department of Justice Relating to Criminal Proceedings 28 CFR 50.2 (1965)
[26] VISTA stands for Volunteers in Service To America, a government program begun in 1964 which sends volunteers into poor areas to teach various job skills and improve living conditions. VISTA workers were often viewed as "outside agitators" by White Southerners and were sometimes harrassed; hence the possibility that the VISTA worker had been "framed".
[27] Citing Walker v. City of Birmingham, 388 U.S. 307 (1967)
[28] Dickinson v. United States, cert.den. 414 U.S. 979 (1973)
[29] Fred W. Friendly and Martha J.H. Elliot, The Constitution: That Delicate Balance. (New York: Random House, 1984) p. 150
[30] Ibid. p. 151

[31] Ibid.
[32] Free Press & Fair Trial (Washington D.C.: American Society of Newspaper Editors/ American Newspaper Publishers Association Foundation, 1982) p. 48.

[33] Ibid.

[34] See State v. Simiants, 194 Neb. 783 236 N.W. 2d 794 (1975)